client privilege attached only after "actual representation" had been undertaken.

Second, the district court concluded that even if Petitioner believed that counsel were representing him, his belief was not objectively reasonable given all of counsel's statements. *Id.* at 28a-29a.

Proceedings on Appeal

On appeal, Petitioner challenged the district court's determination that he had no individual attorney-client privilege. Petitioner argued that counsel's representations established an attorney-client relationship and alternatively, at minimum, that the communications were privileged as pre-representation communications. The Fourth Circuit affirmed, concluding that the district court applied the correct legal standards for evaluating claims of attorney-client privilege. Pet. App. 5a-6a.

1. The Fourth Circuit held that Petitioner "never entered into an attorney-client relationship with the investigating attorneys" and thus, no individual privilege attached to their communications. *Id.* at 10a. The Fourth Circuit held that Petitioner could not assert a privilege based upon a subjective belief that he was being represented by counsel and that he was instead required to prove an "objectively reasonable mutual understanding" that representation had been undertaken. *Id.* at 5a-6a. [3]

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[3] Throughout the opinion, the Fourth Circuit reiterated the "actual representation" standard it was applying. *See also* Pet. App. 5a ("[E]ssential touchstones for the formation of an attorney-client relationship between the investigating attorneys and the appellants were missing."); *id.* at 6a (Counsel's statements were not "sufficient to establish the reasonable understanding that they *were* representing appellants."(emphasis in original)); *id.* at 9a ("Under these circumstances, appellants could not have reasonably believed that the investigating attorneys represented them personally."); *id.* at 12a ("We find no error in the district court's conclusion that the appellants were not clients of the investigating attorneys.") *id.* at 10a ("Had the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their

The Fourth Circuit determined that Petitioner had not met his burden of establishing objective reasonableness because ambiguities in the statements made by counsel were resolved against Petitioner. Even though counsel had advised Petitioner that "we can also represent you," the Court placed weight on the fact that counsel did not advise Petitioner that "we do represent you." The Fourth Circuit explained that "the outcome of this appeal might be different" had Counsel uttered "we do represent you" instead of "we can represent you." *Id.* at 9a-10a. It reasoned that Counsels' statements that the "attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it" relegated the express offer of representation to a "hypothetical pronouncement" that they "*could*" represent him not that they "*were*" representing him. *Id.* at 6a (emphasis in original). The court premised its analysis on the assumption that a personal attorney-client relationship can never be formed if another client (the corporation) controls the privilege even under circumstances establishing a waiver after full disclosure and informed consent. *Id.* at 9a-10a. The Court thus held that in light of the statement that "AOL holds the privilege," Petitioner could not establish a "reasonable understanding" that counsel "were representing" him notwithstanding counsel's advice to Petitioner that they "didn't recommend" that he retain his "own lawyer." *Id.* at 2a-3a.

The Fourth Circuit recognized the obvious conflict of interest created when counsel, in the course of representing AOL during an internal investigation, offered to represent Petitioner (and two other executives) under circumstances where the company would retain the right to control

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statements to the appellants professed they could, they would not have been free to waive the appellants' privilege when a conflict arose. . . . [W]e agree with the district court that the appellants never entered into an attorney-client relationship with the investigating attorneys.")

waivers of the privilege. The Fourth Circuit reasoned that "[h]ad the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their statements to the appellants professed they could, they would not have been free to waive the appellants' privilege when a conflict arose." Pet. App. 10a. If the privilege did attach to these communications, the Fourth Circuit acknowledged, then counsel "would have had to withdraw from all representation and to maintain all confidences," even in the face of counsel's statement that "AOL holds the privilege and can decide whether to keep or waive it." *Id.* The Fourth Circuit thus recognized that counsel's representations were insufficient to establish full disclosure for an informed waiver by Petitioner. It concluded that the dispositive issue was whether representation had been undertaken. Because the Fourth Circuit found that representation had not been undertaken, it "averted" what it referred to as "these troubling issues" and "a potential legal and ethical mine field" from the "watered-down 'Upjohn warnings'" counsel gave Petitioner. *Id.*

2. Wakeford filed a timely Petition for Panel Rehearing, which was denied in an opinion issued on August 18, 2005. Pet. App. 13a-15a. Petitioner filed a timely Motion to Stay Issuance of the Mandate Pending Filing of a Petition for Certiorari to the Supreme Court, which Wakeford timely joined. The Fourth Circuit denied that motion on October 5, 2005.[4]

REASONS FOR GRANTING THE WRIT

For more than a century, this Court has recognized the importance of the attorney-client privilege to the fair

[4] The documents have subsequently been produced to the government; however, relief is still warranted because the court may still effect a partial remedy in the form of requiring the government to return or destroy the documents produced and preventing the government from using them. *See Church of Scientology v. United States*, 506 U.S. 9 (1992). Thus, this issue is not moot and this Court has jurisdiction.

administration of justice and the chilling effect unauthorized disclosure of privileged communications would have on the attorney-client relationship. As this Court explained in *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), "[t]he rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[5]

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), this Court addressed the scope of the attorney-client privilege in the context of corporate internal investigations and held that communications between an employee and corporate counsel are protected by the corporation's attorney-client privilege. This Court recognized that "complications in the application of the privilege arise when the client is a corporation," *id.* at 389, and cautioned that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all," *id.* at 393. Two questions left undecided by *Upjohn* are whether communications between an employee and corporate counsel on corporate matters can ever be protected by an individual attorney-client privilege, and, if so, whether the employee is entitled to assert the privilege when counsel makes an ambiguous statement that could reasonably be construed to constitute an offer to

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[5] *See also United States v. Zolin*, 491 U.S. 554 (1989) (application of the attorney-client privilege is issue of federal common law); *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.").

jointly represent the employee and the corporation. This case presents the opportunity for this Court to resolve both of those important issues because it is quite common for counsel to jointly represent a corporation and individual employees in litigation concerning matters undertaken in an employee's official capacity.

The government argued below that an employee never has an individual attorney-client privilege as to communications with counsel regarding corporate matters, in reliance on the First, Second, and Third Circuits. *See In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 125 (3d Cir. 1986) (holding that a corporate officer has no individual attorney-client privilege as to communications about corporate matters or regarding his role as a corporate officer); *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001) (applying the *Bevill* test); *United States v. International Bhd. of Teamsters*, 119 F.3d 210 (2d Cir. 1997) (applying *Bevill* test). The Tenth Circuit has held that communications between an employee and corporation's counsel may be protected by an individual attorney-client privilege. *See In re Grand Jury Proceedings*, 156 F.3d 1038, 1041-42 (10th Cir. 1998) ("[A] corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability . . . based on conduct interrelated with corporate affairs.").

Review is warranted to resolve a circuit split on the availability of an individual attorney-client privilege under these circumstances and the legal standards governing these issues. The standard adopted by the Fourth Circuit resolves ambiguities in counsel's offer of representation against the client in conflict with legal standards employed in the Seventh and Tenth Circuits. In those circuits, ambiguities are resolved in favor of the client consistent

with a lawyer's ethical duties. Given the frequency of internal corporate investigations, it is important to establish clear standards of disclosure governing counsel's efforts to secure statements from corporate employees who subjectively believe that they are being jointly represented. The uncertainty engendered by the conflict in the circuits, and by the Fourth Circuit's refusal to adopt standards governing the nature of the warnings required by *Upjohn*, engenders litigation and deprives lawyers and clients of the ability to predict whether their discussions will be protected. Certiorari is warranted to provide the certainty that is essential for lawyers to provide sound legal advice based on full information.

I. THE FOURTH CIRCUIT RESOLVED AMBIGUITIES IN THE FORMATION OF THE ATTORNEY-CLIENT RELATIONSHIP IN FAVOR OF THE LAWYER IN CONFLICT WITH LEGAL STANDARDS EMPLOYED IN THE SEVENTH AND TENTH CIRCUITS

1. In conflict with the decision below, the Seventh Circuit has held that ambiguous statements made by counsel concerning potential representation must be resolved in favor of the client. In *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, the Seventh Circuit held that claims of privilege are proper whenever it is reasonable for the claimant to believe that he was being represented by counsel at the time he made the communication. 580 F.2d 1311 (7th Cir. 1978). The court explained, quoting R. WISE, LEGAL ETHICS (1970) 284, that "'The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought.'" 580 F.2d at 1320 n.14. After listing common scenarios when the privilege applies, the court applied the "reasonable belief" standard to infer an individual attorney-client relationship between each member of a trade association and counsel for the

association despite ambiguities in the evidence. Although each member received a letter from the association's general counsel stating that the association had retained outside counsel to represent it, and received no express communication that outside counsel represented them individually, the court found that the members' subjective belief regarding joint representation was reasonable.

What the Seventh Circuit found persuasive was "the nature of the work performed and the circumstances under which confidential information [was] divulged." *Id.* at 1320. The Seventh Circuit held that each member of the association "entertained a reasonable belief" that it was submitting confidential information to the association's counsel, at counsel's request, upon assurances that counsel would hold the information on behalf of the association "in strict confidence not to be disclosed except" in aggregate form to oppose certain legislation and that counsel would protect each member's interests as counsel for the association. *Id.* at 1314, 1321.

In *United States v. Keplinger*, the Seventh Circuit clarified the "reasonable belief" standard set forth in *Westinghouse*. 776 F.2d 678 (7th Cir. 1985). It stated that the standard is satisfied if the "potential client's subjective belief is *minimally* reasonable." *Id.* at 701 (emphasis added). The court ultimately rejected claims by employees of a research laboratory that their communications with corporate counsel were protected by their individual attorney-client privilege. The Seventh Circuit found that the employees only offered their mere subjective belief, which was insufficient to satisfy the standard. *Id.*

Thus, the Seventh Circuit articulated a "reasonable belief" standard viewed from the client's perspective that requires the client to establish that his belief that an attorney-client relationship was formed was "minimally reasonable" and resolves any ambiguity concerning the

formation of that relationship in favor of maintaining the confidentiality of communications.

2. The Tenth Circuit followed the Seventh Circuit's lead and squarely held that ambiguous statements must be resolved in favor of the client. In *Wylie v. Marley Co.*, an employee asserted an individual attorney-client privilege under Kansas law as to statements he made to corporate counsel that he had resigned. 891 F.2d 1463, 1471-72 (10th Cir. 1989). The employee sought to prevent the company from using those statements against him at his wrongful discharge trial. The Tenth Circuit affirmed the district court's exclusion of the communications, holding that the employee "could have believed" that counsel represented him personally when he made the statements because counsel had previously negotiated his employment contract with new management. *Id.* The Tenth Circuit affirmed the district court's holding that "it would have been unfair" to permit counsel to disclose the communications when counsel's legal relationship with the corporation "could have confused" the employee. *Id.*[6]

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[6] Other appellate courts resolve ambiguities in favor of the client as well. In *United States v. Nelson*, the United States Army Court of Military Review relied on decisions from the circuit courts interpreting the federal attorney-client privilege to conclude that "ambiguities regarding the privilege" and "[d]oubts" about the confidentiality of communications with counsel consulted by two parties on different aspects of a common legal problem are resolved in favor of the prospective client. 38 M.J. 710, 715-16 (A.C.M.R. 1993). *See also Barton v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 410 F.3d 1104 (9th Cir. 2005) (resolving ambiguities surrounding the formation of the attorney-client relationship in favor of the client to preserve the confidentiality of the communications under California's attorney-client privilege). The Fifth Circuit in *In re Auclair* elevated the "reasonable belief" standard to a "presumption" of an attorney-client relationship when "more than one person seeks consultation with an attorney on a matter of common interest" and shifts the burden to the opponent to prove otherwise. 961 F.2d 65, 70 (5th Cir. 1992). In applying the presumption, the Fifth Circuit found a joint attorney-client privilege to protect pre-representation communications from an employee to her employer's lawyer even though

3. Under the legal standards employed in the Seventh and Tenth Circuits, Petitioner's communications would have been privileged. Applying the Seventh Circuit's legal standard, Petitioner presented proof that he held a "minimally reasonable belief" that counsel offered to represent him jointly with the company.[7] Counsel expressly offered that they "can also represent him," that they could do so "until such time as there appears to be a conflict of interest," and committed to "advise him at the time that a conflict appears." Petitioner's perception of these statements was reflected in his question to counsel following initial disclosures he made to them. He asked whether he should engage separate representation. Counsel advised that they "didn't recommend" that he do so. Pet. App. 35a-37a. If nothing else, such "recommendation" provided reasonable assurance to Petitioner that counsel were adequately protecting his rights.

Furthermore, Petitioner communicated with counsel on a matter of common interest (his role as an executive in the PurchasePro matter) only after counsel offered to "also represent him." Even if the statement "we can also

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the lawyer ultimately declined to represent the employee and agreed to represent the employer. The court reasoned that "[t]o hold otherwise would present a conundrum whose only acceptable resolution would be that a lawyer may never meet with more than one potential client for fear that the attorney-client privilege would be destroyed as to all." *Id.* Application of this "presumption" also resolves any ambiguity in the formation of the attorney-client relationship in favor of maintaining the confidentiality of the communications.

[7] In *In re Auclair*, the Fifth Circuit cited "[a] now venerable rule emanating from the privilege . . . . '[C]ommunications made in the course of preliminary discussions with a view to employing the lawyer are privileged though employment is not . . . accepted.'" 961 F.2d at 69. The Fifth Circuit reasoned that without protecting pre-representation communications, "'[n]o person could ever safely consult an attorney for the first time . . . if the privilege depended on the chance of whether the attorney after hearing the statement of facts decided to accept employment or decline it.'" *Id.*

represent you" was ambiguous given all of the circumstances, employing the legal standards of the Seventh and Tenth Circuits, the ambiguity would have been resolved in Petitioner's favor to preserve the confidentiality of his communications.

4. The standards employed by the Seventh and Tenth Circuits are consistent with a lawyer's ethical obligations, and the standard employed by the Fourth Circuit is not. While the Fourth Circuit acknowledged that the "watered-down '*Upjohn* warnings'" counsel gave Petitioner is "a potential legal and ethical mine field," it nevertheless adopted a standard in derogation of a lawyer's ethical duties. Pet. App. 10a. A lawyer has well-recognized ethical obligations to zealously represent his client, on one hand, and to inform a client where a conflict exists that he cannot represent the client and that the client should seek representation elsewhere, on the other hand. Furthermore, a lawyer is required to maintain the confidences of all communications received from a client who is not so warned and up until such time as he is so warned. *See* VA. SUP. CT. R., PT. 6, §II, VIRGINIA RULES OF PROFESSIONAL CONDUCT (2005) Rules 1.1 (Pet. App. 52a-54a), 1.3 (Pet. App. 54a-56a), 1.6 (Pet. App. 56a-66a), 1.7 (Pet. App. 66a-75a), 1.9 (Pet. App. 75a-81a), 1.16 (Pet. App. 87a-92a); *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT (2003) Rules 1.1 (Pet. App. 93a-95a), 1.3 (Pet. App. 95a), 1.6 (Pet. App. 95a-97a) 1.7 (Pet. App. 97a-98a), 1.9 (Pet. App. 99a-100a).[8] Additionally, a lawyer is required to maintain confidences of

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[8] *See also* RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS §131 cmt. e (2000) (the corporate attorney must "safeguard[] confidential information" communicated from an employee "when the person reasonably appeared to be consulting the lawyer as present or prospective client with respect to the person's individual interests, and the lawyer failed to warn the associated person that the lawyer represents *only* the organization and could act against the person's interests as a result." (emphasis added)).

all communications divulged in the pre-engagement consultation process even if representation is ultimately declined. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.18(b) (2003) (Pet. App. 104a-105a). The Seventh and Tenth Circuit's formulation of the "reasonable belief" standard that resolves ambiguities in the client's favor enforces a lawyer's ethical obligations.[9]

The Fourth Circuit's resolution of ambiguities in favor of the attorney permits the disclosure of communications that the ethical rules bind a lawyer to hold in confidence. Here, counsel failed to give the requisite admonition to Petitioner when it knew there was a conflict, as evidenced by their statement that "the attorney-client privilege belongs to AOL." Counsel actually employed language contrary to the ethical rules, clearly stating that they "can *also* represent [Petitioner] until such time as there appears to be a conflict of interest," they "will advise [Petitioner] at the time that a conflict appears," and they "didn't recommend" that Petitioner retain "his own lawyer."

5. The Fourth Circuit was apparently constrained to resolve ambiguities in favor of the lawyer because it made two assumptions erroneous as a matter of law.

First, the Fourth Circuit assumed that a lawyer could not represent a company and an employee on a matter of

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[9] In *In re Auclair*, the Fifth Circuit recognized that the "controlling law in this area is 'little more than a reinforcement of the Code of Professional Responsibility, Ethical Considerations, and Disciplinary Rules, promulgated by the American Bar Association and adopted by the [local jurisdictions]' . . . . Of critical importance to a meaningful pre-representation interview is the availability of the attorney-client privilege from the initial salutation and greeting on," 961 F.2d at 69, to enable the lawyer to assess conflicts of interest and to permit efficient decisions regarding accepting or declining representation. *Id.* at 69-70. Consistent with these ethical obligations, the Fifth Circuit formulated its "presumption" of an attorney-client relationship when prospective clients engage in pre-engagement communications on a matter of common interest. *Id.* at 70.

common interest. The Fourth Circuit stated "Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees." Pet. App. 10a. This assumption, while stated as dicta, nevertheless underlies the Fourth Circuit's holding that Petitioner could not have held a "reasonable belief" that counsel was offering him joint representation, or indeed jointly representing him, because such representation was not possible. The Fourth Circuit's legal assumption is in conflict with the Tenth Circuit and rules governing legal ethics.

In *In re Grand Jury Proceedings*, the Tenth Circuit concluded that the district court erred as a matter of law in holding that an employee could never establish a personal attorney-client relationship with corporate counsel if the representation concerned corporate activities. 156 F.3d 1039, 1041-42 (10th Cir. 1998). The Tenth Circuit held that a corporate officer could enter into an attorney-client relationship with corporate counsel if the scope of that representation concerned his personal rights and liabilities, even related to his role as a corporate officer. *Id.* It provided the example that "a corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability . . . based on conduct interrelated with corporate affairs." *Id.* at 1041. The difference, the Tenth Circuit explained, is that an employee could not assert an individual attorney-client privilege when the communications concern the corporation's rights and liabilities. *Id.* Thus, the Tenth Circuit rejected as a matter of law the legal assumption that such representation was impermissible in conflict with the

Fourth Circuit's assumption.

The Virginia, and indeed the model, ethical rules permit an attorney to jointly represent a company and its employee. Rule 1.13 (e) of the Virginia Rules of Professional Conduct provides "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents subject to Rule 1.7," concerning conflicts of interest. VA. SUP. CT. R., PT. 6, §II, VIRGINIA RULES OF PROFESSIONAL CONDUCT Rules 1.13(e) (2005) (Pet. App. 81a-87a). Rule 1.13 (e) of the Model Rules is identical. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (2003) (Pet. App. 100a-102a).

Note 9 of Virginia Rule 1.13 provides, "Paragraph (e) recognizes that a lawyer for an organization may also represent individuals within the organization. When an organization's lawyer is assigned or authorized to represent such an individual, the lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer's representation of both is controlled by the confidentiality and conflicts provisions of these Rules." VA. SUP. CT. R., PT. 6, §II, VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 1.13 note 9 (2005) (Pet. App. 86a). Thus, the ethical rules permit such joint representation as long as a lawyer does not run afoul of the rules on conflicts of interest and confidentiality.

When a conflict does arise, the ethics rules place the burden on the lawyer to clearly advise the employee of the conflict, who the lawyer does and does not represent, and the consequences of continued communication.[10] Note 7 to Virginia Rule 1.13 provides:

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[10] In fact, the Fourth Circuit recognized that counsel's statements were insufficient to establish an effective waiver. The court stated "[h]ad the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their statements to the appellants professed they could, they would not have been free to waive the appellants' privilege when a conflict arose." Pet. App. 10a.

> When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

VA. SUP. CT. R., PT. 6, §II, VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 1.13 note 7 (2005) (Pet. App.85a). Notes 7 and 9 to Rule 1.13 of the Model Rules are substantially the same. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 notes 7, 9 (2003). The Fourth Circuit's formulation of a "reasonable belief" standard that resolves ambiguities in counsel's offer of an attorney-client relationship to an employee in favor of the *lawyer* runs afoul of these ethical obligations.

Second, the court assumed that an attorney-client relationship could not be established if a client knowingly agrees that someone else (the corporation) can control waivers of the privilege. The Fourth Circuit stated that appellants could not "reasonably believe" that they were represented personally "when they were fully apprised that the information they were giving could be disclosed at the company's discretion." Pet. App. 9a. The Fourth Circuit confuses two distinct legal issues. The first one is whether Petitioner held an objectively reasonable subjective belief

that an attorney-client relationship was formed based on representations counsel made, as discussed *supra*. The second one is whether Petitioner effected a waiver of his privilege so that AOL held the only remaining privilege over those communications. The Fourth Circuit's conclusion about the reasonableness of Petitioner's belief is premised on the legal assumption that Petitioner could not have established an attorney-client relationship subject to the corporation controlling the privilege. This legal assumption is in conflict with legal principles established by this Court, the Second Circuit, and the rules of ethics governing a lawyer's conduct.

As early as 1888, in *Hunt v. Blackburn*, this Court set forth the basic legal principles underlying the attorney-client privilege: "the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney." 128 U.S. at 470. Before a waiver of the privilege will become effective, the ethical rules require the lawyer to fully disclosure to the client the consequences of a waiver and to obtain informed consent from the client. *See* VA. SUP. CT. R., PT. 6, §II, VIRGINIA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2005); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2003).

Not only may the client voluntarily waive the privilege, but the client may also delegate the power to waive the privilege to his attorney. In *In re Von Bulow*, the Second Circuit recognized that "an attorney may, in appropriate circumstances, possess an 'implied authority to waive the privilege on behalf of his client.'" 82 F.2d 94 (2d Cir. 1987). Based on these legal principles, it is legally and ethically permissible for a client to effect a blanket waiver of his privilege if the client consents after full disclosure (an element missing in the case *sub judice*.) In the context of

joint representation, this blanket waiver, or delegation of the authority to waive that privilege to his attorney, results in the co-client (the corporation here) holding the privilege over the communications.

It is feasible, and indeed practical, for employees to agree to a blanket waiver of an individual attorney-client privilege in the context of corporate internal investigations when faced otherwise with a Hobson's choice: communicate with corporate counsel without any protection or retain separate counsel and risk being fired for failing to cooperate with an internal investigation. The Fourth Circuit's erroneous legal assumption that joint representation where only one party controls the privilege is impermissible compelled it to formulate a "reasonable belief" standard that resolves ambiguities against the prospective client and prevents companies who want to retain control of the privilege from doing so. This is inconsistent with the intent of *Upjohn* and *Hunt* and contrary to the rules of legal ethics.

6. The outcome in this case exposes the flaws in the Fourth Circuit's formulation of the "reasonable belief" standard. Such a formulation encourages potential abuse by corporate counsel zealously representing the corporation by extracting information from the employees with ambiguous offers of representation while violating his ethical duties to make a clear offer of representation to a prospective client and to maintain communications divulged in the nascent stages of that relationship.

Here, counsel knew how to give proper *Upjohn* warnings, and indeed gave them to the majority of AOL employees interviewed; however, counsel gave Petitioner (and two other executive employees) what the Fourth Circuit termed "watered-down '*Upjohn* warnings'" instead. Those "watered-down" warnings offered Petitioner joint representation on ambiguous terms instead of providing him with fair warning of the potential consequences of

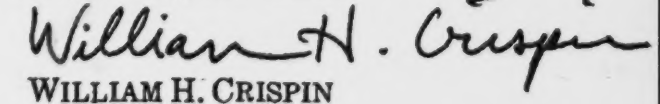
communicating with counsel. Despite counsel's choice to employ "watered-down '*Upjohn* warnings,'" counsel was absolved of their ethical obligations to advise of any conflicts, as they committed to do, and to hold inviolate any communications made after an offer of representation.

Such tension between enforcement of a lawyer's ethical obligations and application of the Fourth Circuit's formulation of the "reasonable belief" standard will cause uncertainty and disparate results concerning both. This Court should grant review to clarify the appropriate legal standard for the availability and application of the attorney-client privilege in these circumstances to resolve such uncertainty.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted, and the communications should be protected by Petitioner's individual attorney-client privilege.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

415 F.3d 333; 2005 U.S. App. LEXIS 14444; Fed. Sec. L. Rep. (CCH) P93,293

March 17, 2005, Argued
July 18, 2005, Decided

In Re: Grand Jury Subpoena: UNDER SEAL. UNDER SEAL, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee. In Re: Grand Jury Subpoena: UNDER SEAL. UNDER SEAL, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee. In Re: Grand Jury Subpoena. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENT WAKEFORD, Defendant-Appellant.

No. 04-4410, No. 04-4411, No. 04-4673

This is an appeal by three former employees of AOL Time Warner ("AOL") from the decision of the district court denying their motions to quash a grand jury subpoena for documents related to an internal investigation by AOL. Appellants argued in the district court that the subpoenaed documents were protected by the attorney-client privilege. Because the district court concluded that the privilege was AOL's alone and because AOL had expressly waived its privilege, the court denied the appellants' motion. We affirm.

I. In March of 2001, AOL began an internal investigation into its relationship with PurchasePro, Inc. AOL retained the law firm of Wilmer, Cutler & Pickering ("Wilmer Cutler") to assist in the investigation. Over the next several months, AOL's general counsel and counsel from Wilmer Cutler (collectively referred to herein as "AOL's attorneys" or the "investigating attorneys")

interviewed appellants, AOL employees Kent Wakeford, John Doe 1, and John Doe 2.[1]

The investigating attorneys interviewed Wakeford, a manager in the company's Business Affairs division, on six occasions. At their third interview, and the first one in which Wilmer Cutler attorneys were present, Randall Boe, AOL's General Counsel, informed Wakeford, "We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company." Memoranda from that meeting also indicate that the attorneys explained to Wakeford that they represented AOL but that they "could" represent him as well, "as long as no conflict appeared." The attorneys interviewed Wakeford again three days later and, at the beginning of the interview, reiterated that they represented AOL, that the privilege belonged to AOL, and that Wakeford could retain personal counsel at company expense.

The investigating attorneys interviewed John Doe 1 three times. Before the first interview, Boe told him, "We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. You are free to consult with your own lawyer at any time." Memoranda from that interview indicate that the attorneys also told him, "We can represent [you] until such time as there appears to be a conflict of interest, [but] . . . the attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it." At the end of the interview, John Doe 1 asked if he needed personal counsel. A Wilmer Cutler attorney

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[1] Because the grand jury has indicted Wakeford, we refer to him by name.

responded that he did not recommend it, but that he would tell the company not to be concerned if Doe retained counsel.

AOL's attorneys interviewed John Doe 2 twice and followed essentially the same protocol they had followed with the other appellants. They noted, "We represent AOL, and can represent [you] too if there is not a conflict." In addition, the attorneys told him that, "the attorney-client privilege is AOL's and AOL can choose to waive it."

In November, 2001, the Securities and Exchange Commission ("SEC") began to investigate AOL's relationship with PurchasePro. In December 2001, AOL and Wakeford, through counsel, entered into an oral "common interest agreement," which they memorialized in writing in January 2002. The attorneys acknowledged that, "representation of [their] respective clients raised issues of common interest to [their] respective clients and that the sharing of certain documents, information, . . . and communications with clients" would be mutually beneficial. As a result, the attorneys agreed to share access to information relating to their representation of Wakeford and AOL, noting that "the oral or written disclosure of Common Interest Materials . . . [would] not diminish in any way the confidentiality of such Materials and [would] not constitute a waiver of any applicable privilege."

Wakeford testified before the SEC on February 14, 2002, represented by his personal counsel. Laura Jehl, AOL's general counsel, and F. Whitten Peters of Williams & Connolly, whom AOL had retained in November 2001 in connection with the PurchasePro investigation, were also present, and both stated that they represented Wakeford "for purposes of [the] deposition." During the deposition, the SEC investigators questioned Wakeford about his discussions with AOL's attorneys. When Wakeford's attorney asserted the attorney-client privilege, the SEC

investigators followed up with several questions to determine whether the privilege was applicable to the investigating attorneys' March-June 2001 interviews with Wakeford. Wakeford told them he believed, at the time of the interviews, that the investigating attorneys represented him and the company.

John Doe 1 testified before the SEC on February 27, 2002, represented by personal counsel. No representatives of AOL were present. When SEC investigators questioned Doe about the March-June 2001 internal investigation, his counsel asserted that the information was protected and directed Doe not to answer any questions about the internal investigation "in respect to the company's privilege." He stated that Doe's response could be considered a waiver of the privilege and that, "if the AOL lawyers were [present], they could make a judgment, with respect to the company's privilege, about whether or not the answer would constitute a waiver."

On February 26, 2004, a grand jury in the Eastern District of Virginia issued a subpoena commanding AOL to provide "written memoranda and other written records reflecting interviews conducted by attorneys for [AOL]" of the appellants between March 15 and June 30, 2001. While AOL agreed to waive the attorney-client privilege and produce the subpoenaed documents, counsel for the appellants moved to quash the subpoena on the grounds that each appellant had an individual attorney-client relationship with the investigating attorneys, that his interviews were individually privileged, and that he had not waived the privilege. Wakeford also claimed that the information he disclosed to the investigating attorneys was privileged under the common interest doctrine.

The district court denied John Doe 1's and John Doe 2's motions because it found they failed to prove they were clients of the investigating attorneys who interviewed them.

The court based its conclusion on its findings that: (1) the investigating attorneys told them that they represented the company; (2) the investigating attorneys told them, "we *can* represent you," which is distinct from "we *do* represent you"; (3) they could not show that the investigating attorneys agreed to represent them; and (4) the investigating attorneys told them that the attorney-client privilege belonged to the company and the company could choose to waive it.

The court initially granted Wakeford's motion to quash because it found that his communications with the investigating attorneys were privileged under the common interest agreement between counsel for Wakeford and counsel for AOL. Following a motion for reconsideration, the court reversed its earlier ruling and held that the subpoenaed documents relating to Wakeford's interviews were not privileged because it found that Wakeford's common interest agreement with AOL postdated the March-June 2001 interviews. In addition, the court held that Wakeford failed to prove that he was a client of the investigating attorneys at the time the interviews took place. The court based its conclusion on its findings that: (1) none of the investigating attorneys understood that Wakeford was seeking personal legal advice; (2) the investigating attorneys did not provide any personal legal advice to him; and (3) the investigating attorneys believed they represented AOL and not Wakeford. This appeal followed.

II. Appellants argue that because they believed that the investigating attorneys who conducted the interviews were representing them personally, their communications are privileged. However, we agree with the district court that essential touchstones for the formation of an attorney-client relationship between the investigating attorneys and the appellants were missing at the time of the interviews. There is no evidence of an objectively reasonable, mutual

understanding that the appellants were seeking legal advice from the investigating attorneys or that the investigating attorneys were rendering personal legal advice. Nor, in light of the investigating attorneys' disclosure that they represented AOL and that the privilege and the right to waive it were AOL's alone, do we find investigating counsel's hypothetical pronouncement that they *could* represent appellants sufficient to establish the reasonable understanding that they *were* representing appellants. Accordingly, we find no fault with the district court's opinion that no individual attorney-client privilege attached to the appellants' communications with AOL's attorneys.[2]

We apply a two-fold standard of review in this case. We give deference to the district court's determination of the underlying facts, and review those findings for clear error. *In re. Grand Jury Subpoena v. Under Seal, 341 F.3d 331, 334 (4th Cir. 2003)*; *see also In re. Allen et al., 106 F.3d 582, 601 (4th Cir. 1997)* (noting the two-fold standard of review). A finding of fact is clearly erroneous, despite the presence of evidence to support it, when the reviewing court, after carefully examining all the evidence, is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)*. We review the application of legal principles *de novo*. *In re. Grand Jury Subpoena, 341 F.3d at 334*.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the

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[2] The grand jury's return of an indictment against Wakeford does not moot his appeal because the government continues to seek records from the March-June 2001 interviews for trial as to Wakeford and through a second grand jury as to others. Given this high probability of reoccurrence, our opinion is in no way advisory. *See In re. Grand Jury Proceedings, 33 F.3d 342, 347 (4th Cir. 1994)* (applying the "capable of repetition, yet evading review" exception to the mootness doctrine in the context of expired grand jury).

common law." *Upjohn v. United States, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981).* "When the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure." *Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998).* Because its application interferes with "the truthseeking mission of the legal process," *United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986),* however, we must narrowly construe the privilege, and recognize it "only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Trammel v. United States, 445 U.S. 40, 50, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980).* Accordingly, the privilege applies only to "confidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States, 425 U.S. 391, 403, 48 L. Ed. 2d 39, 96 S. Ct. 1569 (1976).*[3] "The burden is on the proponent of the attorney-client privilege to demonstrate its applicability." *Jones, 696 F.2d at 1072.*

The person seeking to invoke the attorney-client privilege must prove that he is a client or that he affirmatively sought to become a client. "The professional relationship . . . hinges upon the client's belief that he is

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[3] This circuit has adopted the classic test to determine whether the attorney-client privilege applies to certain communications or documents. The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982).*

consulting a lawyer in that capacity and his manifested intention to seek professional legal advice." *United States v. Evans, 113 F.3d 1457, 1465 (7th Cir. 1997).* An individual's subjective belief that he is represented is not alone sufficient to create an attorney-client relationship. *See United States v. Keplinger, 776 F.2d 678, 701 (7th Cir. 1985)*("We think no individual attorney-client relationship can be inferred without some finding that the potential client's subjective belief is minimally reasonable"); *see also, In re. Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 923 (8th Cir. 1997)* ("We know of no authority . . . holding that a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one."). Rather, the putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances.[4]

With these precepts in mind, we conclude that appellants could not have reasonably believed that the investigating attorneys represented them personally during the time frame covered by the subpoena. First, there is no evidence that the investigating attorneys told the appellants that they represented them, nor is there evidence that the appellants asked the investigating attorneys to represent them. To the contrary, there is evidence that the investigating attorneys relayed to Wakeford the company's offer to retain personal counsel for him at the company's

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[4] This court addressed the question of whether a corporate employee could personally assert the attorney-client privilege for communications with corporate counsel conducting an internal investigation in *United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996).* In *Aramony*, this court affirmed the finding of the district court that Aramony was not the client of internal investigation counsel. The court noted that Aramony did not seek legal advice; Aramony could not have reasonably believed that the information he disclosed would be kept confidential; and internal investigation counsel told Aramony that they were retained to represent the company. *Id. at 1390-92.*

expense, and that they told John Doe 1 that he was free to retain personal counsel. Second, there is no evidence that the appellants ever sought personal legal advice from the investigating attorneys, nor is there any evidence that the investigating attorneys rendered personal legal advice. Third, when the appellants spoke with the investigating attorneys, they were fully apprised that the information they were giving could be disclosed at the company's discretion. Under these circumstances, appellants could not have reasonably believed that the investigating attorneys represented them personally.[5] Therefore, the district court's finding that appellants had no attorney-client relationship with the investigating attorneys is not clearly erroneous.[6]

The appellants argue that the phrase "we *can* represent you as long as no conflict appears," manifested an agreement by the investigating attorneys to represent them. They claim that, "it is hard to imagine a more straightforward assurance of an attorney-client relationship than 'we can represent you.'" We disagree. As the district court noted, "we *can* represent you" is distinct from "we *do* represent you." If there was any evidence that the investigating attorneys had said, "we *do* represent you," then the outcome

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[5] The district court made no finding as to whether the appellants, in fact, believed that the investigating attorneys represented them personally.

[6] Appellants maintain the district court improperly relied on *In Re Bevill, Bresler, & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986)*, in determining that appellants did not have an attorney-client relationship with the investigating attorneys. They contend that *Bevill* creates a litmus test this circuit has not adopted for determining whether there is an attorney-client relationship between corporate employees and corporate counsel. It is unnecessary to decide whether we find *Bevill* fully consistent with our views on this matter because based on the circumstances we have identified, it would not have been objectively reasonable for appellants to believe that the investigating attorneys represented them personally.

of this appeal might be different. Furthermore, the statement actually made, "we *can* represent you," must be interpreted within the context of the entire warning. The investigating attorneys' statements to the appellants, read in their entirety, demonstrate that the attorneys' loyalty was to the company. That loyalty was never implicitly or explicitly divided. In addition to noting at the outset that they had been retained to represent AOL, the investigating attorneys warned the appellants that the content of their communications during the interview "belonged" to AOL. This protocol put the appellants on notice that, while their communications with the attorneys were considered confidential, the company could choose to reveal the content of those communications at any time, without the appellants' consent.

We note, however, that our opinion should not be read as an implicit acceptance of the watered-down "Upjohn warnings" the investigating attorneys gave the appellants. It is a potential legal and ethical mine field. Had the investigating attorneys, in fact, entered into an attorney-client relationship with appellants, as their statements to the appellants professed they could, they would not have been free to waive the appellants' privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences. Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees. However, because we agree with the district court that the appellants never entered into an attorney-client relationship with the investigating attorneys, they averted these troubling issues.

III. Wakeford also claims that the documents in question are protected by the joint defense privilege because of his common interest agreement with AOL. However, the district court found that no common interest agreement existed at the time of the interviews in March-June 2001. This finding was not clearly erroneous.

The joint defense privilege, an extension of the attorney-client privilege, protects communications between parties who share a common interest in litigation. *United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir. 1989)*; *see also Aramony, 88 F.3d at 1392.* The purpose of the privilege is to allow persons with a common interest to "communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *In re. Grand Jury Subpoenas 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990).* For the privilege to apply, the proponent must establish that the parties had "some common interest about a legal matter." *Sheet Metal Workers Int'l Assoc. v. Sweeney, 29 F.3d 120, 124 (4th Cir. 1994).* An employee's cooperation in an internal investigation alone is not sufficient to establish a common interest; rather "some form of joint strategy is necessary." *United States v. Weissman, 195 F.3d 96, 100 (2d Cir. 1999)*; *see also Aramony, 88 F.3d at 1392* ("To be entitled to the protection of this privilege the parties must first share a common interest about a legal matter.").

The district court found that "an agreement to share information pursuant to a common interest did not exist prior to December 2001." Uncontradicted affidavits submitted by counsel for AOL, including Randall Boe, who participated in the March-June 2001 interviews, support the court's finding. Boe stated that, at the time of the interviews, AOL had not entered into an agreement with Wakeford regarding their joint defense. There is no evidence showing that AOL and Wakeford were pursuing a common legal strategy before December 2001. During the

March-June 2001 interviews, AOL was in the early stages of its internal investigation; there is no evidence that the investigating attorneys' interviews with Wakeford were for the purpose of formulating a joint defense. Indeed, the stated purpose of the interviews was to gather information regarding AOL's relationship with PurchasePro; it would have been difficult for AOL to know at that time whether its interests were consistent with or adverse to Wakeford's personal interests. The court's finding was therefore not clearly erroneous.

Because there is no evidence that Wakeford and AOL shared a common interest before December 2001, we find no error in the district court's conclusion that Wakeford had no joint defense privilege before that time.

IV. After review of the district court's factual findings and legal conclusions, we find no clear error. We find no error in the district court's conclusion that the appellants were not clients of the investigating attorneys and therefore could not assert the attorney-client privilege to prevent disclosure of the subpoenaed documents. Further, we agree with the district court's finding that, because Wakeford failed to establish that he and AOL were cooperating in a common defense before December 2001, he has no joint defense privilege before that time. The district court therefore properly denied the appellants' motions.

AFFIRMED.

FILED: AUGUST 18, 2005

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 04-4673
(CR-04-178)

In Re: Grand Jury Subpoena: GRAND JURY SUBPOENA

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

versus

KENT WAKEFORD,

Defendant – Appellant.

ORDER

Appellant, Kent Wakeford, has petitioned for rehearing on several grounds, including the claim that the District Court and this court "completely ignore[d]" his affidavit claiming that investigating counsel told him that they represented him. However, he misreads the District Court's and this court's opinions.

Clearly, the District Court did not ignore Wakeford's affidavit, which he now claims conflicted with affidavits of four of the investigating attorneys. In fact, the District Court addressed the affidavits in its opinion, finding the four

investigating attorneys' affidavits "credible", thereby rejecting Wakeford's assertions. J.A. at 257-58. Therefore, from the evidence before it, the District Court found that investigating counsel told Wakeford that they "could" represent Wakeford, not that they "did" represent Wakeford, and Wakeford did not fairly claim otherwise in this court. Indeed, in his brief, Wakeford stated that, "[i]t is also undisputed that Company counsel told Mr. Wakeford, we could represent you as long as there is no conflict...." App. Brief at 15 (emphasis in original). When questioned during oral argument Wakeford's counsel never fairly asserted that investigating counsel told him that they did represent him, but instead repeated the refrain that investigating counsel told him, "we can represent you."[1]

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[1] The following excerpts from oral argument illustrate the point:

COUNSEL: I think the key to the case from my perspective is the unimpeached, uncontested affidavit of Mr. Wakeford...which is supported by Mr. Clayman's affidavit...and is also supported by four affidavits from internal corporate counsel...Boe, Coolidge, Jehl, and Wychulis, all of which support my client's affidavit. Those affidavits from company counsel...support Mr. Wakeford's contentions and they are tellingly silent on one major point in this case, that is why internal counsel...told my client, quote "We can represent you too, until and unless a conflict occurs."

* * *

COUNSEL: When you say "we can represent you too until and unless there is a conflict" you affirmatively tell the person you are interviewing that, assuming you accept that offer, we do in fact represent you.

* * *

PANEL: They didn't say "we also represent you"

COUNSEL: They said "we can represent you too." "We can represent you too."

* * *

COUNSEL: But they told the person "we represent you too...."

PANEL: I don't think they ever said that. They said there's no bar to our representing you because there's no conflict. They didn't say "we represent you" at any point did they?

Nor did Wakeford brief and argue that the District Court was required to conduct an evidentiary hearing to resolve a claimed factual dispute. Under the circumstances, we see no reason to disturb our conclusion that the district court's finding that there was no attorney-client relationship between Wakeford and the investigating attorneys is not clearly erroneous.

Accordingly, it is ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Wilson, United States District Judge, sitting by designation, with the concurrence of Chief Judge Wilkins and Judge Niemeyer.

For the Court – By Direction

/s/ Patricia S. Connor
Clerk

COUNSEL: Well they said "we can represent you." Now that is taken by my client, and I suggest reasonably, to mean if I accept that offer, they do represent me.

* * *

PANEL: They never said ...You have said a couple of times here that they said to him they represented him, but they never said that.

COUNSEL: We can represent you too, okay, and then I talk confidentially.

* * *

PANEL: They said "we can represent you."

COUNSEL: That's right....We can represent you....

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FILED
JUNE 2, 2004
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE GRAND JURY SUBPOENA [REDACTED] and KENT WAKEFORD,, Petitioners, v. UNITED STATES of AMERICA, Respondent.	1 : 02A209 (GBL) 1 : 04 MG 17B

AMENDED MEMORANDUM OPINION AND ORDER

THIS Matter is before the Court on the Petitioners' Joint Motion to Intervene and to Quash a Subpoena. This action concerns a grand jury subpoena for the production of documents that the Petitioners allege are protected by attorney-client privilege. The question before the Court is whether privilege protects the documents requested by the subpoena where one Petitioner executed a common interest agreement with the subpoenaed company and where the other Petitioners were told by the company's lawyers they represented the company, but could represent them as well. The Court concludes that the subpoena :lust be modified to

exclude documents pertaining to Petitioner Wakeford, because the execution of the common interest agreement between Mr. Wakeford's representatives and the company's representatives created a joint defense privilege that has not be waived. Furthermore, the Court finds that the subpoena will not be quashed or modified with respect to Petitioners [REDACTED] and [REDACTED] because no attorney-client privilege exists with respect to their communications because they cannot show that they were the "clients" of the attorneys that conducted investigative interviews.

I. BACKGROUND

On February 26, 2004, a grand jury issued a subpoena to Time Warner, Inc. for the production of written memoranda and other written records reflecting interviews conducted by attorneys, both in-house and outside counsel[2] (collectively hereinafter referred to as corporate counsel or "Internal Investigation Counsel", of five current and former employees of America Online, Inc., a division of Time Warner, Inc. (collectively, the "Company"). The interviews were conducted after a Company executive raised concerns about the propriety of the Company's business relationship with PurchasePro.com, and were unrelated to any government investigation. In response to the subpoena, the Company agreed to waive any privilege and prepared to produce the documents pursuant to a confidentiality agreement entered into with the Government. However, before any document were turned over, the Company notified counsel for the five individuals whose records the grand jury requested that it had received a subpoena. Upon learning of the subpoena, three of those five persona – [REDACTED], [REDACTED], and Kent Wakeford

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[2] "Outside counsel" refers to attorneys from the law firm of Wilmer, Cutler, & Pickering, who were engaged by AOL to aid the Company's in-house counsel in conducting the interviews.

(collectively, the "Petitioners"), each of whom is the subject of the ongoing grand jury investigation – filed this Joint Motion in an effort to prevent the Company from producing confidential records to the grand jury.

Petitioners argue that documents responsive to the subpoena are protected by attorney-client privilege created by statements made to them by the Internal Investigation Counsel during the interviews. Petitioners state that corporate counsel told them that they could represent the Petitioners and that it was not necessary for them to get their own attorneys. Based upon these statements, Petitioners argue that they reasonably believed that what they said to corporate counsel was privileged communication between a client and an attorney. Even if there was no actual privilege, Petitioners contend that courts regularly find privilege where the proponent reasonably believed that the communication was confidential. Furthermore, Petitioners argue that the attorney-client privilege they hold is independent of the Company's privilege and therefore, cannot be waived by the company. Given that the Petitioners have not waived any privilege, Petitioners contend that the subpoena must be quashed.

The Government, on the other hand, argues that the Petitioners have no privilege because they were told the any privilege belonged to the Company and that the Company could choose to waive it. Additionally, the Government contends that courts do not find privilege between employees and corporate, counsel where the subject matter of the conversations between them was the business affairs of the Company. Finally, the government states that the determination of whether privilege attaches to communication is not dependent upon whether the proponent of the privilege reasonably believed that the privilege existed.

II. DISCUSSION

A. Standard of Review

A subpoena duces tecum may be quashed or modified if it calls for privileged matter. *See In re Horn*, 976 F.2d 1314 (9th Cir. 1992). The decision of whether to quash on this ground is a matter within the discretion of the trial judge. *See United States v. Nixon*, 94 S.Ct. 3090 (1974).

Privilege protects the substance of communications made in confidence by a client to his attorney. *United States v. Underseal*, 742 F.2d 871, 874 (4th Cir. 1984). The purpose of privilege is to encourage full and frank communication between attorneys and their clients in order to promote broader public interests in the observance of law and the administration of justice. *Id.* However, privilege must be construed narrowly, because it can be inconsistent with the general duty to disclose and can impede the investigation of truth. *Id* at 875.

B. Analysis

With respect to Petitioner Wakeford, the subpoena shall be modified to exclude all documents pertaining to his interview with corporate counsel because these documents are subject to a common interest agreement his representatives along with representatives from the Company executed in order to protect certain shared material, including memoranda and other documents related to his interview, as privileged with respect to any third party. The common interest agreement, along with the parties' understanding that any information shared between them would be confidential, created a joint defense privilege that can only be waived by all parties to the privilege. Given that Petitioner Wakeford has chosen not to waive the privilege, the documents responsive to the grand jury subpoena are privileged and this aspect of the subpoena must be quashed.

On the other hand, Petitioners [REDACTED]and [REDACTED] do not assert a joint defense privilege, but rather argue that they were the clients, along with the Company, of corporate counsel and that as such, they are entitled to a privilege that is independent of the Company's. The Court concludes, however, that Petitioners [REDACTED] and [REDACTED] were not the clients of the corporate counsel, and are therefore not entitled to protection pursuant to attorney-client privilege because there is :insufficient evidence to overcame the presumption that there is no independent attorney-client relationship between employees and corporate counsel.

1. Joint Defense Privilege

Petitioner Wakeford's communications with the internal investigation counsel are subject to a joint defense privilege pursuant to a common interest agreement entered into between the attorney representatives of the Company and Mr. Wakeford. The joint defense privilege or rule is similar to attorney-client privilege in that it protects confidential communications between individuals who share a community of interests just as attorney-client privilege would protect those communications between each client and his or her own attorney. *See generally in re Grand Jury Subpoenas*, 89-3 and 89-4; John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990) (finding that the joint defense privilege protects the free flow of information from client to attorney whenever multiple clients share a common interest about a legal matter). The purpose of the joint defense rule is to enable parsons with a common interest to communicate with their respective attorneys and with each other so that they may effectively prosecute or defend their claims. *Id.* Additionally, in determining whether the joint defense privilege applies, courts have considered (1) whether exchanges were made with the reasonable expectation that they would be confidential and (2) whether the exchanges

were intended and reasonably believed to be in furtherance the joint defense or common interest. *See Sheet Metal Workers Inter. Ass'n v. Sweeney*, 29 F.3d 120, 124-125 (4th Cir. 1996) (finding no joint defense privilege where no common interest between parties and no expectation of confidentiality).

In the instant action, it is clear that the exchange of material related to the internal investigation was intended to be confidential and that this exchange was in furtherance of a joint defense because the exchange was made pursuant to a common interest agreement. Representatives from the Company, representatives for Petitioner Wakeford, and representatives for other America Online, Inc. ("AOL") executives executed, on behalf of their clients, an agreement entitled "Common Interest Agreement" in January of 2002. This agreement detailed the mutual understanding of the signatories with respect to the sharing of information regarding the representation of their clients. Specifically, the Common Interest Agreement states that it arises from and relates to the representation of the representatives' clients who are current or former executives of AOL, and "any pending and future proceeding(s) related to that subject tatter, including matters presently pending before the U.S. Securities and Exchange Commission or any other negotiation, mediation, arbitration, investigation and/or litigation that may occur." Additionally, this agreement acknowledges that common interests exist and that the sharing of materials would "facilitate the rendition of professional legal services to our respective clients." Also, the agreement states that the materials exchanged pursuant to this agreement "are privileged from disclosure to adverse or other parties as a result of the attorney-client privilege, the attorney work-product doctrine, and/or other applicable privileges."

Interview notes and other relevant information now sought by the grand jury were turned over to the Company

with the expectation that this material would be subject to, and protected by the Common Interest Agreement. Furthermore, this information was exchanged with the hope that it would be useful to both the Company and Mr. Wakeford in their preparation for current and future litigation related to the Company's relationship with PurchasePro.com. Accordingly, the Common Interest Agreement conforms to the joint defense rule in letter and in spirit because it is meant to enable these persons, who share an interest in potential litigation, to more effectively defend themselves without fear of waiver of certain privileges. As such, the information pertaining to Petitioner Wakeford's interview with corporate counsel is privileged pursuant to the joint defense privilege created by the common interest agreement. Now, the question becomes whether the joint defense privilege has been waived.

2. Waiver of the Joint Defense Privilege

Petitioner Wakeford's privilege as not been waived, because a joint defense privilege can only be waived with the consent of all parties. *See In re Grand Jury Subpoenas*, 902 F.2d at 248. Petitioner Wakeford maintains that he has not waived his privilege with respect to the internal investigation communications. Furthermore, although the Company has waived its privilege, this waiver alone is insufficient to destroy the joint defense privilege. Therefore, the subpoena with respect to Petitioner Wakeford shall be quashed because the material subject to the subpoena, specifically documents regarding Mr. Wakeford's interviews with the internal investigation counsel, is protected by the joint defense privilege.

3. Attorney-Client Privilege

Petitioners [REDACTED] and [REDACTED] may not claim the attorney-client privilege in order to shield notes of their interviews with corporate counsel and other related

information because they cannot show that they were represented by corporate counsel in their individual capacities. Rather than argue that they are protected a common interest agreement, Petitioners [REDACTED] and [REDACTED] assert that they are protected by attorney-client privilege since statements made during their interviews manifested an agreement for representation by corporate counsel. Petitioner [REDACTED] and Petitioner [REDACTED] claims that they were represented by corporate counsel are not sufficiently supported by facts because: (1) the Petitioners were cold that the internal Investigation Counsel represented the Company; (2) Petitioners were told by Internal Investigation Counsel that we can represent you, which is distinct from we represent you; (3) Petitioners [REDACTED] and [REDACTED] cannot show that members of the Internal Investigation Counsel agreed to represent them; and (4) Petitioners [REDACTED] and [REDACTED] were told that the privilege belonged to the Company and that the Company could choose to waive it, which negates any idea of confidentiality.

The question of whether attorney-client privilege exists must be answered, in the Fourth Circuit, by applying the classic test, which states that the privilege only applies if: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *United States v. Jones*, 696 F.2d 1069, 1073 (4th Cir. 1982). In the instant action, the question of whether attorney-

client privilege applies turns on whether Petitioners [REDACTED] and [REDACTED] were or sought to be clients of the Internal Investigation Counsel.

Petitioner [REDACTED] was interviewed on May 4, 2001 and May 16, 2001. At the beginning of the interview on May 4, [REDACTED] was told by attorneys from the firm of Wilmer, Cutler, and Pickering ("Wilmer") as well as AOL's in-house counsel that: (1) we represent AOL; (2) we can represent you toe if there is not a conflict; (3) we have an obligation to tell you about any conflicts we might see; and (4) the attorney-client privilege is AOL's and AOL could choose to waive it. Petitioner [REDACTED] asserts that based upon these statements, it was his reasonable belief that the internal investigation counsel were his personal representatives as well as representatives of the Company.

Similar statements were made to Petitioner [REDACTED] however, one memorandum prepared by a member of the internal investigation counsel states that [REDACTED] was told: (1) we represent the Company; (2) these conversations are privileged, but the privilege belongs to the Company and the Company decides whether to waive it; and (3) you are free to consult with your owns lawyer at any time. Additionally, [REDACTED] asked in his interview on April 27, 2001, whether [REDACTED] should get separate representation. [REDACTED] was reportedly told by Mr. Bruce Coolidge, an attorney from Wilmer, that separate representation was not recommended, unless there were any concerns. Based upon these representations, Petitioned [REDACTED] also argues that [REDACTED] statements are protected by attorney-client privilege.

Courts, when addressing the issue of whether a :arty is a client for purposes of attorney-client privilege, are reluctant to find an individual attorney-client privilege for communications between employees and corporate counsel. *See e.g. In re Grand Jury Subpoena Duces Tecum*, 96 F.2d 32, 34 (2d Cir. 1986) (rejecting assertion of privilege by

officer where the documents in question were in the possession of the corporation and where the officer offered no proof that the communications to counsel were regarding his personal affairs rather than the affairs of the corporation,); *U.S. v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1905) (finding no attorney-client relationship where there was no evidence that the employees sought advice in their individual capacities and where the employees did not manifest a belief that they were represented individually).

A corporation is an incorporeal body that is only capable of acting through its agents; and accordingly, it can be difficult to define whom or what constitutes the client. In addressing this jostle, Courts have considered (1) whether the party approached corporate counsel for the purpose of seeking legal advice; (2) whether the party explained that he or she sought legal advice in an individual capacity; (3) whether corporate counsel expressly agreed to represent the party despite the potential conflict of interest; and (4) whether the subject matter of the communications concerned matters regarding the affairs of the corporation. *See Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123 (3d Cir. 1986); *U.S. v. Keplinger*, 776 F.2d 670, 701 (7th Cir. 1985); *Continental Oil Co. v. U.S.*, 330 F.2d 347 (9th Cir. 1964).

The Court concludes that Petitioners [REDACTED] and [REDACTED] cannot show an attorney-client relationship based on the facts presented. With respect to Petitioners [REDACTED] and [REDACTED] neither alleges that they approached members of the Internal Investigation Counsel for the purpose of seeking legal advice, nor do they allege that they obtained legal advice in their individual capacities. It is undisputed that the interviews were conducted behalf of AOL, in response to concerns about the propriety of the Company's business relationship with PurchasePro.com. Similarly, it was the Company that sought out and hired attorneys from Wilmer

to work with its own in-house counsel. Additionally, it was the Company that received the legal advice and the Petitioners cannot show that the subject matter of the communications involved the Petitioners in their individual capacities as opposed to their role as employees of a company involved in a securities fraud investigation.

Furthermore, Petitioners' subjective expectations based upon contact with the Internal Investigation Counsel do not support a claim that the Internal Investigation Counsel manifested an understanding that they would be representing Petitioners [REDACTED] and [REDACTED] in their individual capacities. Petitioners contend that the second statement that we have an obligation to notify you of any conflict we may see is an indication that the Internal Investigation Counsel also saw the relationship as one of attorney and client because conflicts of interest only arise between clients being represented by the same attorney. However, this statement is not an indication of belief on the part of the Internal Investigation Counsel that they were talking to the Petitioners as clients because the context of the conversation involved the attorney's explanation of what may happen if Internal Investigation Counsel were to represent the Company as well as the employee. Based upon the above analysis, Petitioners [REDACTED] and [REDACTED] have not demonstrated the existence of an attorney-client relationship.

Alternatively, Petitioners [REDACTED] and [REDACTED] argue that the issue of whether an employee has an individual privilege is determined by whether that communication was "expressly made confidential" or whether the employee could reasonably assume under the circumstances that the attorney would understand it to be intended to be confidential. *See Sheet Metal Workers*, 29 F.3d at 125; *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355-56 (4th Cir. 1984); *United States v. Under Seal*, 748 F.2d 871 (4th Cir. 1964). However, the quotes in the cases

that Petitioners cite refer to the issue of whether the clients had an expectation that the communications would be confidential, rather than whether the proponent of the privilege is or sought to be a client, the issue before this Court. For example, in *United States v. Underseal*, the issue before the Court was whether the attorneys' would be required to turn over the subpoenaed documents in spite of the attorneys' and their clients' assertions of privilege where the district court concluded that there were non-confidential responsive documents that could be produced. *See United States v. Underseal*, 748 F.2d at 873. The court concluded that some documents were privileged and that ethers were not based upon whether the client reasonably expected that the communications would remain confidential. *Id.* There was no issue as to whether the proponent of the privilege was or sought to beta client of the attorney asserting the privilege.

Even accepting the Petitioners contention that the standard for privilege is based upon reasonable belief, Petitioner [REDACTED] and Petitioner [REDACTED] claims would nevertheless fail because their beliefs were not reasonable. First, Petitioners were told by the Internal Investigation Counsel that' they represented the Company. Second, it should be noted that the statement made to Petitioners was we can represent you, which is distinct from we do or we will represent you. We can represent you is not a statement of actual representation, but rather the potential for representation. Third, Petitioners were clearly told that any privilege belonged to the Company and that the Company could choose to waive it, which negates the idea that the communications were expressly made confidential because this statement may be understood to mean that the Company may willingly disclose the communication to third parties. Given the three factors listed above, Petitioners [REDACTED] and [REDACTED] cannot show that their belief that they were represented by Internal Investigation Counsel was reasonable.

Accordingly, Petitioner [REDACTED] and Petitioner [REDACTED] cannot assert attorney-client privilege as a means to quash or modify the subpoena in order to limit the production of documents related to their interviews with Internal Investigation Counsel because they cannot show that the were or sought to become clients of the attorneys with whom they communicated.

III.CONCLUSION

Petitioner Wakeford has demonstrated that he is entitled to assert the joint defense privilege with respect to documents pertaining to his communications with Internal Investigation Counsel because the responsive documents that the grand jury seeks were given to the Company pursuant to a Common Interest Agreement that his representatives entered into along with the representatives of the Company. Accordingly, the subpoena shall be quashed as to Petitioner Wakeford to exclude documents pertaining to Petitioner Wakeford, to the extent that they were subject to the common Interest Agreement. On the other hand, Petitioner [REDACTED] and Petitioner [REDACTED] have no privilege to assert with respect to their communications because they were not clients of the Internal Investigation Counsel. Petitioners [REDACTED] and [REDACTED] did not seek out corporate counsel's representation, they did not assert that they obtained legal advice in their individual capacities, and the subject matter of communications was presumably the business relationship between AOL and PurchasePro.com. Furthermore, Petitioners [REDACTED] and [REDACTED] were put on notice by the Internal Investigation Counsel that they represented the Company and that any privilege belonged to the Company and the Company could choose to waive it. The Company has chosen to waive the privilege, and with respect to Petitioners [REDACTED] and [REDACTED], the

responsive documents must be produced. Therefore, it is hereby

ORDERED that Petitioners' Joint Motion to Quash is GRANTED in part and DENIED in part. The Joint Notion is GRANTED and the subpoena is hereby MODIFIED to exclude responsive materials referring to Mr. Wakeford, which are subject to the Common Interest Agreement. The Joint Motion is DENIED with respect to responsive materials pertaining to Petitioners [REDACTED] and [REDACTED].

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 2nd day of June, 2004.

/s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
06/2/04

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In Re: Grand Jury Subpoena: UNDER SEAL. UNDER SEAL, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee. In Re: Grand Jury Subpoena: UNDER SEAL. UNDER SEAL, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee. In Re: Grand Jury Subpoena. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENT WAKEFORD, Defendant-Appellant.

No. 04-4410, No. 04-4411, No. 04-4673

EXCERPT FROM ORAL ARGUMENT
MARCH 17, 2005

JUDGE NIEMEYER: I want to clarify. It seems to me there is that ambiguous statement which says "we can represent you." It may not be inaccurate in the absence of a conflict but it seems to me the point that I was trying to present in the question is that a corporation when it seeks its own information from its officers is going to announce that it represents the corporation; this is a privileged conversation; this privilege belongs to the corporation and can only be waived by the corporation. If it turns out to be a conflict, we will get you counsel and we'll pay for it. Now, that seems to be fairly routine. The one statement that Mr. Asbill [counsel for Kent Wakeford] pointed out that could create ambiguity is that we can represent you. It may be an accurate statement that until there is a conflict we can do so but Mr. Asbill argues and argues forcefully that that also might have created a subjective understanding in the officer's mind, although ambiguous. It seems to me that it's hard to take in context . . . to figure it out in context but I don't think that particular statement may be so routine but I would be happy to hear where you make a difference.

COUNSEL FOR [redacted – John Doe 2]: Your Honor. I was going to agree with what you were saying. That it was not routine at all as evidenced by the fact that AOL in fact notified counsel for each of these appellants and said there may be different circumstances with the three of you than there are for other employees interviewed because typical warnings given by internal investigation counsel are what you said -- We do not represent you. We represent the company and the privilege belongs to the company.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

TO: Time Warner
c/o Richard Cullen
McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23229

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

__ PERSON _X_ DOCUMENT(S) OR OBJECT(S)

YOU ARE COMMANDED to appear before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
UNITED STATES DISTRICT COURT 401 Courthouse Square Alexandria, Virginia 22314	GRAND JURY ROOM DATE AND TIME March 16, 2004 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s): [footnote omitted]

Written memoranda and other written records reflecting interviews conducted by attorneys for the Company and/or Wilmer, Cutler & Pickering, of [REDACTED], Joseph Ripp, Kent Wakeford, and Mark Wovsaniker, between March 15 and June 30, 2001, concerning the Company's

commercial relationship with PurchasePro.Com, excluding opinion work product.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK ELIZABETH H. PARET, CLERK OF THE COURT	DATE February 26, 2004
Deputy Clerk [illegible signature]	

[illegible] J. McNulty United States Attorney	Name, Address and Phone Number of Assistant U.S. Attorney Charles Connolly U.S. Attorney's Office [illegible]

[COMPANY LOGO OMITTED]
AMERICA ONLINE
INCORPORATED

Curtis Lu
Senior Vice President and
Deputy General Counsel
email: Curtislu@aol.com

March 24, 2004

BY FACSIMILE AND FIRST CLASS MAIL

William H. Crispin
Crispin & Associates, P.L.L.C.
1156 15th Street, NW
Suite 1105
Washington, DC 20005

Re: Grand Jury Subpoena

Dear Bill:

I am writing to follow up on my letter of March 10, 2004 to Kip Johnson. I have set forth below the body of that letter and added a notation of the author of the documents that had been previously identified, which is based on the best of our current knowledge.

* * * * * * * *

April 27, 2001. On this date, [REDACTED] was interviewed by lawyers from Wilmer, Cutler & Pickering ("WCP") (Pat Carome, Bruce Coolidge, Julie Riewe) and lawyers from AOL's Legal department (Randy Doe, Laura Jehl, Katherine Wychulis). We have identified six documents that relate to that interview.

One memorandum drafted by a WCP lawyer indicates the following about a statement made at the beginning of the interview: "We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. You are free to consult with your own lawyer at any time."

That memorandum also indicates the following about a statement made at the end of the interview: "At the end: [REDACTED] asks Bruce Coolidge if he needs his own lawyer. Bruce says not necessarily, but if he has any concerns at all to do it, and that Bruce would advise AOL not to think that there was anything wrong with [REDACTED] getting a lawyer." [This was written by Julie Riewe.]

One memorandum drafted by an AOL lawyer indicates the following about a statement made at the beginning of the interview: "The interview began after an introduction by Randy Boe. Randy explained that the AOL lawyers and the Winner, Cutler lawyers represent America Online. The lawyers can also represent [REDACTED] until such time as there appears to be a conflict of interest between AOL and [REDACTED]. The lawyers will advise [REDACTED] at the time that a conflict appears. The attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it." [This was written by Laura Jehl and Katherine Wychulis.]

One document drafted by an AOL lawyer indicates the following about a statement made at the beginning of the interview: " — Priv warning — we represent Company, can rep him until we become aware of conflict." [This was written by Laura Jehl.]

One document drafted by a WCP lawyer indicates the following about a statement made at the end of the interview: "At end: note → [REDACTED] ask BC if needs own lawyer. BC — didn't recc, but if you have any concerns at all, don't — tell co. not to think anything at all wrong[1] w/getting own lawyer." [This was written by Julie Riewe.]

One document drafted by a WCP lawyer indicates the following about a statement made at the beginning of the interview: "BC: The co. decides whether or not to waive the privilege". [This was written by Pat Carome.]

One document drafted by an AOL lawyer indicates the following about a statement made at the beginning of the interview: "We rep. AOL & can rep. you u/l we're aware of a conflict. The privilege belongs to the co & it decides whether to hold[2] it or waive it." [This was written by Katherine Wychulis.]

May 9, 2001. On this date, [REDACTED] had a communication with Ms. Jehl. We have identified one document that relates to this communication. That document does not contain any notation of any similar warning, statement, or representation by Ms. Jehl to [REDACTED]. [This was written by Laura Jehl].)

June 19, 2001. On this date, [REDACTED] was interviewed by WCP lawyers (Joe Brenner, Bill McLucas, Julie Riewe) and an AOL lawyer (Laura Jehl). We have identified two documents related to this interview. Neither of these documents contain any notation of any similar

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1 In our conversation, I had previously indicated that this ward was "way." Upon further review, it appears to be "wrong."

2 Upon further review, this word could be read as "keep".

warning, statement, or representation by WCP or AOL lawyers to [REDACTED]. [These were written by Bill McLucas and Julie Riewe]

Undated. We have identified one document that relates to an undated communication between [REDACTED] and an AOL lawyer, Karen Litsinger. The document does not contain a notation of any similar warning, statement, or representation made by Ms. Litsinger to [REDACTED]. [This was written by Karen Litsinger.]

* * * * * * * * *

In light of the pendency of the Motion to Quash, we are also providing a copy of this letter to the U.S. Attorney's Office.

Very truly yours,

/s/ Curtis P. Lu
Curtis P. Lu
Senior Vice President and
Deputy General Counsel
America Online

CPL/eho
cc: Charles F. Connolly

22000 AOL Way • Dulles, VA 20166 • tel: 703-265-2545 •
fax: 703-265-1105
www.aol.com

FILED UNDER SEAL

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

In re Grand Jury Subpoena [REDACTED] and Kent Wakeford, Petitioners, v. United States of America, Respondent.	No. ___

DECLARATION OF EVERETT C. JOHNSON, JR.

I, Everett C. Johnson, Jr., declare:

1. I am a partner of the law firm of Latham & Watkins LLP. My law firm represents [REDACTED].

2. I make this declaration, except where otherwise indicated, on personal knowledge. Because this declaration relates to an ongoing grand jury investigation, it is being filed under seal.

3. On February 27, 2004, I received a letter from Richard Cullen, Esq. informing us that America Online, Inc., [REDACTED] former employer, had received a grand jury subpoena compelling the production of certain documents relating to [REDACTED] including notes and memoranda

of interviews conducted of [REDACTED] by counsel. A copy of Mr. Cullen's letter is attached hereto as Exhibit A.

4. Neither [REDACTED] nor Latham & Watkins LLP has been provided access to the interview memoranda or notes in question, despite our requests to review them.

5. On March 1, and March 3, 2004, I spoke by telephone with Curtis Lu, Esq., Deputy General Counsel for America Online, Inc. During the course of that telephone conversation, Mr. Lu read for me relevant portions of the interview memoranda relating to statements made to [REDACTED] by counsel present during those interviews. The description I received by telephone is consistent with Mr. Lu's description of those memoranda set forth in a letter dated March 10, 2004 from Mr. Lu to me attached hereto as Exhibit B.

6. On March 3, 2004, my partner, Beth Wilkinson, notified counsel for America Online, Inc. and counsel for the United States of [REDACTED] assertion of attorney-client privilege and objection to the production of documents. Ms. Wilkinson's letters are attached hereto as Exhibits C and D respectively.

7. We have been informed by counsel for America Online, Inc. (*see* Exhibit E) and the United States (*see* Exhibit F) that production of the interview memoranda in question would not be sought or provided pending the Court's disposition of the instant motion.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of March, 2004.

[Signature]
Everett C. Johnson, Jr.

Exhibit A to Johnson Declaration

[LETTERHEAD OMITTED]

McGUIRE WOODS

February 27, 2004

Everett C. Johnson, Jr., Esq.
LATHAM & WATKINS
555 11th Street, N.W.
Suite 1000
Washington, D.C. 20004-1304

RE: AOL, INC. INVESTIGATION

Dear Mr. Johnson:

We received yesterday a grand jury subpoena for the following materials concerning your client: Written memoranda and other written records reflecting interviews conducted by attorneys for the Company and/or Wilmer, Cutler & Pickering, [REDACTED], between March 15 and June 30, 2001, concerning the Company's commercial relationship with PurchasePro.Com, excluding opinion work product.

In an abundance of caution, in light of the Supreme Court's decision in Prelman v. United States, 247 U.S. 7 (1918); we are advising you of these facts so that you may take whatever action you deem appropriate.

Sincerely,

Richard Cullen

RC:dgc

cc: Chuck Connolly, AUSA

Exhibit B to Johnson Declaration

[COMPANY LOGO OMITTED]
AMERICA ONLINE
INCORPORATED

March 10, 2004

Curtis Lu
Senior Vice President and Deputy General Counsel
email: Curtislu@aol.com

BY FACSIMILE AND FIRST CLASS MAIL

Everett C. Johnson, Jr.
Latham & Watkins
555 11TH Street, N.W.
Washington, D.C. 20004

Re: Grand Jury Subpoena

Dear Kip:

I am writing in connection with Richard Cullen's letters to you of February 27, 2004. I enclose a copy of the grand jury subpoena served on Time Warner that is referenced in Richard's letters.

I am also writing to memorialize the substance of my conversations with you on March 1 & 3, 2004, as well as to add further explanatory details.

April 27, 2001. On this date [REDACTED] was interviewed by lawyers from Wilmer, Cutter & Pickering ("WCP") (Pat Carome, Bruce Coolidge, Julie Riewe) and lawyers from AOL's Legal department (Randy Boe, Laura Jehl, Katherine Wychulis). We have identified six documents that relate to that interview.

One memorandum drafted by a WCP lawyer indicates the following about a statement made at the beginning of the interview: "We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. You are free to consult with your own lawyer at any time."

That memorandum also indicates the following about a statement made at the end of the interview: "At the end: [REDACTED] asks Bruce Coolidge if he needs his own lawyer. Bruce says not necessarily, but if he has any concerns at all to do it, and that Bruce would advise AOL not to think that there was anything wrong with [REDACTED] getting a lawyer."

One memorandum drafted by an AOL lawyer indicates the following about a statement made at the beginning of the interview: "The interview began after an introduction by Randy Boe. Randy explained that the AOL lawyers and the Wilmer, Cutler lawyers represent America Online. The lawyers can also represent [REDACTED] until such time as there appears to be a conflict of interest between AOL and [REDACTED]. The lawyers will advise [REDACTED] at the time that a conflict appears. The attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it.

One document drafted by an AOL lawyer indicates the following about a statement made at the beginning of the interview: "—Priv warning — we represent Company, can rep him until we become aware of conflict".

One document drafted by a WCP lawyer indicates the following about a statement made at the end of the interview: "At end: note → [REDACTED] ask BC if needs own lawyer. BC — didn't recc, but if you have any concerns at all, don't – tell Co. not to think anything at all wrong[1] w/getting own lawyer".

One document drafted by a WCP lawyer indicates the following about a statement made at the beginning of the interview: "BC: The co. decides whether or not to waive the privilege."

One document drafted by an AOL lawyer indicates the following about a statement made at the beginning of the interview, "We rep. AOL & can rep. you u/l we're aware of a conflict. The privilege belongs to the co & it decides whether to hold[2] it or waive it."

May 9, 2001. On this date, [REDACTED] had a communication with Ms. Jehl. We have identified one document that relates to this communication. That document does not contain any notation of any similar warning, statement, or representation by Ms. Jehl to [REDACTED].

June 19, 2001. On this date [REDACTED] was interviewed by WCP lawyers (Joe Brenner, Bill McLucas, Julie Riewe) and an AOL lawyer (Laura Jehl). We have identified two documents related to this interview. Neither of these documents contain any notation of any similar warning, statement, or representation by WCP or AOL lawyers to [REDACTED].

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1 In our conversation, I had previously indicated that this word was "way." Upon further review, it appears to be "wrong."

2 Upon further review, this word could be read as "keep".

Undated. We have identified one document that relates to an undated communication between [REDACTED] and an AOL lawyer, Karen Litsinger. The document does not contain a notation of any similar warning, statement, or representation made by Ms. Litsinger to [REDACTED].

The Company is continuing its review of documents that may be responsive to the Government's subpoena. If we identify any other documents that are responsive to that subpoena, we will promptly notify you of that fact. The United States Attorney's office is aware that we are providing you a copy of the subpoena and the information and language containing the interviews, but we have not provided a copy of this letter to the U.S. Attorney's office.

Please do not hesitate to contact me should you have any further questions.

Very truly yours,

/s/ Curtis P. Lu
Curtis P. Lu
Senior Vice President and Deputy
General Counsel
America Online

CPL/cho
Enclosure

22000 AOL Way • Dulles, VA 20166 • tel: 703-265-2545 •
fax: 703-265-1105
www.aol.com

Exhibit C to Johnson Declaration

[LETTERHEAD OMITTED]

LATHAM & WATKINS

MARCH 3, 2004

VIA FACSIMILE (804) 698-2035

Richard Cullen, Esq.
McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030

Re: [REDACTED]

Dear Mr. Cullen:

We have received your letter dated February 27, 2004 informing us that AOL has received a grand jury subpoena seeking the production of certain records related to our client [REDACTED], specifically, "[w]ritten memoranda and other written records reflecting interviews conducted by attorneys for the Company and/or Wilmer, Cutler & Pickering, [REDACTED] between March 15 and June 30, 2001, concerning the Company's commercial relationship with PurchasePro.Com excluding opinion work product." We appreciate your notification and recognition of [REDACTED] right to challenge that subpoena.

We wish to notify you that in light of the information provided to [REDACTED] by counsel at the outset of these interviews, we believe that [REDACTED] has an attorney-client privilege with respect to those communications. Accordingly, any memoranda reflecting those communications or any others may not be shared with third parties, including the government, absent a waiver by him.

We are limited in our ability to determine whether waiver is appropriate without first examining the memoranda and therefore request that you make them available for our review. In addition, would you please confirm that you will not produce any memoranda or written records outlined above until after there has been a final court determination that these records and memoranda can be released notwithstanding [REDACTED] assertion of privilege.

Please notify us whether, and to what extent, you are prepared to honor [REDACTED] assertion of privilege. We would be happy to discuss this issue with you further should you desire. Please feel free to contact me or Kip Johnson at any time.

Sincerely,

/s/ Beth A. Wilkinson
Beth A. Wilkinson
of LATHAM & WATKINS LLP

cc: Claudius Modesti
Chuck Connolly

Exhibit D to Johnson Declaration

[LETTERHEAD OMITTED]

LATHAM & WATKINS

MARCH 3, 2004

VIA FACSIMILE (703) 299-3981

Claudius Modesti, Esq.
Chuck Connolly
Assistant United States Attorneys
U.S. District Court for the
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, VA 22314

Re: AOL, Inc. Investigation

Gentlemen:

Our firm represents [REDACTED] in the above-entitled matter. On February 27, 2004, counsel for AOL notified us that AOL has received a grand jury subpoena calling for the production of "[w]ritten memoranda and other written records reflecting interviews conducted by attorneys for the Company and/or Wilmer, Cutler & Pickering, [REDACTED] between March 15 and June 30, 2001, concerning the Company's commercial relationship with PurchasePro.Com excluding opinion work product."

We wish to notify you that in light of the information provided to [REDACTED] by counsel at the outset of these interviews, we believe that [REDACTED] has an attorney-client privilege with respect to those communications. Accordingly, any memoranda reflecting those communications may not be shared with third parties, including the government, absent a waiver by him.

These documents have not been made available to [REDACTED] and thus we are unable to determine whether [REDACTED] might waive his privilege. It would be of assistance therefore if you would inform AOL that the United States does not object to our reviewing the material in question. We have also notified Company counsel that [REDACTED] asserting his attorney-client privilege and, in the event the United States does not withdraw its subpoena, requested that the Company honor that privilege until after there has been a final court determination concerning the United States' ability to compel production over [REDACTED] objection.

We would appreciate your advising us of your position as soon as possible.

Sincerely,

/s/ Beth A. Wilkinson
Beth A. Wilkinson
of LATHAM & WATKINS LLP

cc: Richard Cullen

FILED UNDER SEAL

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

In re Grand Jury Subpoena [REDACTED] and Kent Wakeford, Petitioners, v. United States of America, Respondent.	No. ____

DECLARATION OF LAWRENCE S. ROBBINS

I, Lawrence S. Robbins, declare:

1. I am a partner in the firm of Robbins, Russell, Englert, Orseck & Untereiner LLP. I represent [REDACTED], one of the petitioners in this proceeding. [REDACTED] retained me on or around August 28, 2002.

2. I make this declaration based on personal knowledge in support of petitioners' Motion to Intervene and to Quash a Subpoena served on AOL. Because this declaration relates to an ongoing grand jury investigation, it is being filed under seal. See Fed. R. Crim. P. 6(e).

3. In August 2002, AOL restated its accounting for certain advertising and commercial revenues from (among other entries) PurchasePro.com. The PurchasePro.com restatement resulted in various government investigations

of the circumstances surrounding the PurchasePro transaction, including a grand jury investigation pending in the Eastern District of Virginia.

[portions omitted]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of March, 2004, in Washington, D.C.

/s/ Lawrence S. Robbins
Lawrence S. Robbins

Rules of the Supreme Court of Virginia
Part Six Integration of the State Bar
Section II. Virginia Rules of Professional Conduct
Client – Lawyer Relationship

Rule 1.1 Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

NOTES:

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.

A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Virginia Code Comparison

Rule 1.1 is substantially similar to DR 6-101(A). DR 6-101(A)(1) provided that a lawyer "shall undertake representation only in matters in which ... [t]he lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters." DR 6-101(A)(2) also permitted representation in matters if a lawyer "associated with another lawyer who is competent in those matters."

[Committee Commentary omitted]

Rule 1.3 Diligence.

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

NOTES:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[1a] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the

client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Virginia Code Comparison

With regard to paragraph (a), DR 6-101(B) required that a lawyer "attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."

Paragraphs (b) and (c) adopt the language of DR 7-101(A)(2) and DR 7-101(A)(3) of the Virginia Code.

[Committee Commentary omitted]

Rule 1.6 Confidentiality of Information.

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program.

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney

must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

NOTES:

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[5a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[7a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

[7b] Compliance with Rule 1.6(a) might include fulfilling duties under Rule 1.14, regarding a client with an impairment.

[7c] Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[8a] Lawyers involved in insurance defense work that includes submission of detailed information regarding the client case to an auditing firm must be extremely careful to gain consent from the client after full and adequate disclosure. Client consent to provision of information to the insurance carrier does not equate with consent to provide the information to an outside auditor. The lawyer must obtain specific consent to disclose the information to that auditor. Pursuant to the lawyer duty of loyalty to the client, the lawyer should not recommend that the client provide such consent if the disclosure to the auditor would in some way prejudice the client. Legal Ethics Opinion #1723, approved by the Supreme Court of Virginia, September 29, 1999.

Disclosure Adverse to Client

[9] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[10] Several situations must be distinguished.

[11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(c). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of

the duty prescribed in Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.

[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[13] Third, the lawyer may learn that a client intends prospective criminal conduct. As stated in paragraph (c)(1), the lawyer is obligated to reveal such information. Some discretion is involved as it is very difficult for a lawyer to "know" when proposed criminal conduct will actually be carried out, for the client may have a change of mind.

[14] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client, the nature of the client's intended conduct, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take appropriate action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

[15] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[16] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also

withdraw or disaffirm any opinion, document, affirmation, or the like.

[17] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or

professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[20] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supercession.

Attorney Misconduct

[21a] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their

obligations to clients and to the profession. Paragraph (c)(3) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.

[21b] Although paragraph (c)(3) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

Former Client

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Virginia Code Comparison

Rule 1.6 retains the two-part definition of information subject to the lawyer's ethical duty of confidentiality. EC 4-4 added that the duty differed from the evidentiary privilege in that it existed "without regard to the nature or source of information or the fact that others share the knowledge." However, the definition of "client information" as set forth in the ABA Model Rules, which includes all information "relating to" the representation, was rejected as too broad.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was

not permitted to reveal "confidences" unless the client first consented after disclosure.

Paragraph (b)(1) is substantially the same as DR 4-101(C)(2).

Paragraph (b)(2) is substantially similar to DR 4-101(C)(4) which authorized disclosure by a lawyer of "[c]onfidences or secrets necessary to establish the reasonableness of his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

Paragraph (b)(3) is substantially the same as DR 4-101(C)(3).

Paragraph (b)(4) had no counterpart in the Virginia Code.

Paragraphs (c)(1) and (c)(2) are substantially the same as DR 4-101(D).

Paragraph (c)(3) had no counterpart in the Virginia Code.

[Committee Commentary omitted]

Rule 1.7. Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

NOTES:

Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once

been established, is continuing, see Comment to Rule 1.3 and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Nevertheless, a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation – specifically, child custody, child support, visitation, spousal support and maintenance or division of property.

Special Considerations in Common Representation

[5] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some

situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[6] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[7] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if

one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[8] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(b).

[9] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Consultation and Consent

[10] A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure

necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

Lawyer's Interests

[11] A lawyer may not allow business or personal interests to affect representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. Similarly, a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest. A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client.

Conflicts in Litigation

[12] Paragraph (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony,

incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

[13] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[14] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be materially limited. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

[15] A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

[16] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is a potential conflict include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[17] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[18] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. The lawyer should make clear his relationship to the parties involved.

[19] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

[20] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Virginia Code Comparison

This Rule is similar to DR 5-101(A) and DR 5-105(C). DR 5-101(A) provided that "[a] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances." DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the

possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Rule 1.7(b) clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the lawyer must believe that he can provide competent and diligent representation, that the representation must be lawful, and the representation must not involve asserting a claim on behalf of one client against another client in the same litigation or other proceeding before a tribunal. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it [be] obvious that [the lawyer] can adequately represent" the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if his personal interests or desires may affect adversely the advice to be given or services to be rendered the prospective client."

[Committee Commentary omitted]

Rule 1.9. Conflict of Interest: Former Client.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

NOTES:

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not

precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Lawyers Moving Between Firms

[3] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences

concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the Virginia Code. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of

all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[7] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[8] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[9] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions

[10] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved and other lawyers may be subject to imputed disqualification under Rule 1.10. If a lawyer left one

firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs 1.9 (b) and (c) concerning confidentiality have been met.

[11] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using non-confidential information about that client when later representing another client.

[12] Disqualification from subsequent representation is primarily for the protection of former clients but may also affect current clients. This protection, however, can be waived by both. A waiver is effective only if there is full disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

[13] With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Virginia Code Comparison

Paragraph (a) is substantially the same as DR 5-105(D), although the Rule requires waiver by both a lawyer's current and former client, rather than just the former client.

There was no direct counterpart to paragraph (b) in the Virginia Code. Representation by a lawyer adverse to a client of a law firm with which a lawyer was previously associated was sometimes dealt with under the rubric of Canon 9 of the Virginia Code which provided: "A lawyer should avoid even the appearance of impropriety."

There was no counterpart to paragraph (c) in the Virginia Code. The exception in the last clause of paragraph

(c)(1) permits a lawyer to use information relating to a former client that is in the "public domain," a use that also was not prohibited by the Virginia Code which protected only "confidences and secrets." Since the scope of paragraphs (a) and (b) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

[Committee Commentary omitted]

Rule 1.13. Organization as Client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

NOTES:

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. These persons are referred to herein as the constituents of the corporate

organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] The decisions of constituents of the organization ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Substantial justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy

of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(c) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to government organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be

defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Government lawyers, in many situations, are asked to represent diverse client interests. The government lawyer may be authorized by the organization to represent subordinate, internal clients in the interest of the organization subject to the other Rules relating to conflicts.

Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

[7] When the organization's interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent individuals within the organization. When an organization's lawyer is assigned or authorized to represent such an individual, the lawyer has an attorney-client relationship with both that individual and the organization. Accordingly, the lawyer's representation of both is controlled by the confidentiality and conflicts provisions of these Rules.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Virginia Code Comparison

There was no direct counterpart to this Rule in the Disciplinary Rules of the Virginia Code. EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent the individual in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated that although a lawyer "may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-106(B) provided that a lawyer "shall not permit a person who ... employs ... him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

[Committee Commentary omitted]

Rule 1.16. Declining Or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

NOTES:

[1] A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the

appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed pro se.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

Retention of Client Papers or File When Client Fails or Refuses to Pay Fees/Expenses Owed to Lawyer

[10] Paragraph (e) eschews a "prejudice" standard in favor of a more objective and easily-applied rule governing specific kinds of documents in the lawyer's files.

[11] The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

Virginia Code Comparison

Paragraph (a) is substantially the same as DR 2-108(A).

Paragraph (b) is substantially similar to DR 2-108(B) which provided that a lawyer "may withdraw from representing a client if: (1) Withdrawal can be effected without material prejudice to the client; or (2) The client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust; or (3) The client fails to fulfill an obligation to the lawyer regarding the lawyer's services and such failure continues after reasonable notice to the client; or (4) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client."

Paragraph (c) is identical to DR 2-108(C).

Paragraph (d) is based on DR 2-108(D), but does not address documents in the lawyer's files (which are handled under paragraph (e).

Paragraph (e) is new.

[Committee Commentary omitted]

COMPETENCE

RULE 1.1 ABA MODEL RULES OF PROFESSIONAL CONDUCT

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association

of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Model Code Comparison

DR 6-101(A)(1) provided that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it." DR 6-101(A)(2) required "preparation adequate in the circumstances." Rule 1.1 more fully particularizes the elements of competence. Whereas DR 6-101(A)(3) prohibited the "[N]eglect of a legal matter," Rule 1.1 does not contain such a prohibition. Instead, Rule 1.1 affirmatively requires the lawyer to be competent.

[Comment omitted]

RULE 1.3 ABA MODEL RULES OF PROFESSIONAL CONDUCT

A lawyer shall act with reasonable diligence and promptness in representing a client.

[Comment omitted]

RULE 1.6 ABA MODEL RULES OF PROFESSIONAL CONDUCT

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against

the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

[Comment omitted]

Model Code Comparison

Rule 1.6 eliminates the two-pronged duty under the Model Code in favor of a single standard protecting all information about a client "relating to representation." Under DR 4-101, the requirement applied to information protected by the attorney-client privilege and to information "gained in" the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." EC 4-4 added that the duty differed from the evidentiary privilege in that it existed "without regard to the nature or source of information or the fact that others share the knowledge." Rule 1.6 imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal "confidences" unless the client first consented after disclosure.

Paragraph (b) redefines the exceptions to the requirement of confidentiality. Regarding paragraph (b)(1), DR 4-101(C)(3) provided that a lawyer "may reveal [t]he intention of his client to commit a crime and the information necessary to prevent the crime." This option existed regardless of the seriousness of the proposed crime.

With regard to paragraph (b)(2), DR 4-101(C)(4) provided that a lawyer may reveal "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct." Paragraph (b)(2) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee; for example, recovery of property from the client.

CONFLICT OF INTEREST: GENERAL RULE

RULE 1.7 ABA MODEL RULES OF PROFESSIONAL CONDUCT

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consent after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[Comment omitted]

Model Code Comparison

DR 5-101(A) provided that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-105(A) provided that a lawyer "shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-107(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services."

Rule 1.7 clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the representation reasonably appears not to be adversely affected by the lawyer's other interests. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it is obvious that he can adequately represent" the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."

CONFLICT OF INTEREST: FORMER CLIENT

RULE 1.9 ABA MODEL RULES OF PROFESSIONAL CONDUCT

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related
matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantial related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

[Comment omitted]

Model Code Comparison

There was no counterpart to paragraphs (a) and (b) in the Disciplinary Rules of the Model Code. The problem addressed in paragraph (a) was sometimes dealt with under the rubric of Canon 9 of the Model Code, which provided: "A lawyer should avoid even the appearance of impropriety." EC 4-6 stated that the "obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

The provision in paragraph (a) for waiver by the former client is similar to DR 5-105(C).

The exception in the last sentence of paragraph (b) permits a lawyer to use information relating to a former client that is in the "public domain," a use that was also not prohibited by the Model Code, which protected only "confidences and secrets." Since the scope of paragraph (a) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

RULE 1.13 ABA MODEL RULES OF PROFESSIONAL CONDUCT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of

the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[Comment omitted]

Model Code Comparison

There was no counterpart to this Rule in the Disciplinary Rules of the Model Code. EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated that although a lawyer "may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-107(B) provided that a lawyer "shall not permit a person who . . . employs . . . him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

DECLINING OR TERMINATING REPRESENTATION

RULE 1.16 n18 ABA MODEL RULES OF PROFESSIONAL CONDUCT (2002)

n18 Amended February 5th, 2002, American Bar Association House of Delegates, Philadelphia, Pennsylvania, per Report No. 401.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

[Comment omitted]

DUTIES TO PROSPECTIVE CLIENT

RULE 1.18 n20 ABA MODEL RULES OF PROFESSIONAL CONDUCT (2002)

n20 Added February 5th, 2002, American Bar Association House of Delegates, Philadelphia, Pennsylvania, per Report No. 401.

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related

matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

[Comment omitted]